No. 81-1617

Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner,

VS.

RAYMOND J. PLACE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

Of Counsel:

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney,
International Association of Chiefs of Police, Inc.
Gaithersburg, Md. 20878

EVELLE J. YOUNGER, ESQ.
Chairman of the Board,
Americans for Effective Law Enforcement, Inc.
Los Angeles, California 90017

HOWARD G. BERRINGER, ESQ.
Assistant Director,
Americans for Effective Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco,
California 94080

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus,
Northwestern University
School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director,
Americans for Effective Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco,
California 94080

JAMES P. MANAK, ESQ.
General Counsel,
Americans for Effective Law Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

Counsel for Amici Curiae

Pandick Press Midwest, Inc. Chicago • 454-7600

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Interest of Amici	1
Argument	3
I.	
THE FOURTH AMENDMENT DOES NOT PROHIBIT LAW ENFORCEMENT OFFICERS FROM DETAINING FOR A REASONABLE PERIOD OF TIME PERSONAL LUGGAGE REASONABLY SUSPECTED OF CONTAINING NARCOTICS, FOR THE PURPOSE OF ARRANGING EXPOSURE TO A NARCOTICS DETECTION DOG.	3
Conclusion	9

TABLE OF AUTHORITIES

PAGE

Cases

Carroll v. *United States*, 267 U. S. 132 (1925) 3

Dunaway v. *New York*, 442 U. S. 200 (1979) 7

Michigan v. *Summers*, 101 S. Ct. 2587, 29 Cr L 3097 (1981) 7

People v. *Mayberry*, 644 P. 2d 810, 31 Cr L 2190 (Cal. 1982) 5

State of Florida v. *Royer*, 389 So. 2d 1007 (Fla. App. 1979), *cert. granted*, No. 80-2146 8

State of Illinois v. *Gates*, 88 Ill. App. 3d 1095, 423 N. E. 2d 887 (Ill. 1981), *cert. granted*, No. 81-430 8

United States v. *Klein*, 626 F. 2d 22 (7th Cir. 1980) 4, 5, 6

United States v. *Martell*, 654 F. 2d 1356 (9th Cir. 1981) 5

United States v. *Ross*, ____ U. S. ____, 102 S. Ct. 2157, 31 Cr L 3051 (1982) 3

United States v. *Van Leeuwen*, 397 U. S. 249 (1970) 4, 5, 7

United States v. *Viegas*, 639 F. 2d 42 (1st Cir. 1981), *cert. denied*, No. 80-1344 (May 4, 1981). 5, 6

United States v. *West*, 651 F. 2d 71 (1st Cir. 1981) 5, 6

Article

Annotation, Use of Trained Dogs to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment, 31 ALR Fed. 931. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner,

VS.

RAYMOND J. PLACE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Rex E. Lee, Solicitor General of the United States, Counsel for Petitioner, and James D. Clark, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in

establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* forty-four times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

AELE and **IACP** well know the problems faced by law enforcement officers in their good faith attempts to conduct stops and detentions for investigatory purposes that comport with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. The state of this intricate complex of rules as applicable to airport confrontations with suspected narcotics couriers, and the severity of the drug trafficking problem, compels these organizations to speak on behalf of law enforcement officers in this case.

ARGUMENT

I.

THE FOURTH AMENDMENT DOES NOT PROHIBIT LAW ENFORCEMENT OFFICERS FROM DETAINING FOR A REASONABLE PERIOD OF TIME PERSONAL LUGGAGE REASONABLY SUSPECTED OF CONTAINING NARCOTICS, FOR THE PURPOSE OF ARRANGING EXPOSURE TO A NARCOTICS DETECTION DOG.

Amici will not reiterate at length the legal arguments made by the Government in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address the key legal issues in this case, and point out their importance to the effectiveness of law enforcement nationwide.

The decision of the Second Circuit Court of Appeals is in direct conflict with three different Circuit Courts of Appeals. If allowed to stand it will all but eliminate the good faith efforts of law enforcement agents to conduct effective investigatory stops and investigations at airports, and will all but end the attempts by the federal Government and the states to stem the burgeoning traffic in illegal drugs presently utilizing our commercial air transportation system as its distribution network.

This Court took note of the realities of modern transportation in its relationship to crime in *Carroll* v. *United States*, 267 U. S. 132 (1925), by fashioning a reasonable and common sense exception to the warrant requirement of the Fourth Amendment for motor vehicles. It followed the same approach recently in *United States* v. *Ross*, ____ U. S. ____, 102 S. Ct. 2157, 31 Cr L 3051 (1982), an approach supported by *amici* in that case. In the present case we ask the Court to recognize another reality of modern transportation, i.e., that commercial

air transportation has become the unwitting and unwilling vital link in the movement of illicit drugs into and within this country and that it will be *impossible* for law enforcement agents to have any meaningful impact upon this illegal activity unless they are given reasonable and common sense powers to investigate such crimes.

All three of the Circuit Court cases referred to arose out of Drug Enforcement Agency (DEA) airport confrontations with persons reasonably suspected of carrying narcotics, as in the instant case. In these cases the courts ruled that the federal agents did not violate the Fourth Amendment when temporarily detaining luggage for the purpose of exposure to a narcotics detection dog.

In *United States* v. *Klein*, 626 F. 2d 22 (7th Cir. 1980), DEA agents developed reasonable suspicion that two deplaning passengers were carrying contraband in their suitcases. One of the agents informed the suspects that they were free to leave, but that their suitcases would be detained while the agents attempted to obtain a search warrant. The agents first awaited the arrival of a drug detection dog and then obtained a search warrant after the dog alerted them to the presence of drugs in the luggage. The court ruled that the agents' actions adequately protected the suspects' privacy interest in their luggage and that, given reasonable suspicion, "they would have been remiss in not detaining the bags for further investigation." 626 F. 2d at 26.

The Seventh Circuit in *Klein* relied heavily on this Court's decision in *United States* v. *Van Leeuwen*, 397 U. S. 249 (1970), where it was held that the Fourth Amendment permits the temporary detention of effects for further investigation when police reasonably believe that those effects contain contraband. In *Van Leeuwen*, two packages sent through the United States mails aroused the suspicion of postal officials. The postal officials detained the packages for a day while the

police conducted an investigation. The information obtained during this period was used to obtain a search warrant, and contraband was discovered in the packages.

The First and Ninth Circuits agreed with the Seventh Circuit in *Klein* and applied the principles of *Van Leeuwen* to uphold the validity of temporary detentions of baggage in order to arrange a dog sniff.[1] In *United States* v. *Viegas*, 639 F. 2d 42 (1st Cir. 1981), *cert. denied*, No. 80-1344 (May 4, 1981), DEA agents reasonably suspected that an arriving passenger was carrying drugs in his suitcase. The Court held that the agents' reasonable suspicion justified the temporary detention of the luggage, even though it would inconvenience the defendant. The same court reaffirmed this holding in another case in which luggage was detained on reasonable suspicion pending arrival of a dog, while the suspect was permitted to leave. *United States* v. *West*, 651 F. 2d 71 (1st Cir. 1981).

The Ninth Circuit case is *United States* v. *Martell*, 654 F. 2d 1356 (1981). In that case DEA agents stopped the defendants upon their arrival at the San Diego airport on the basis of a reasonable suspicion that they were carrying contraband. Approximately 20 minutes later, the defendants and the luggage they were carrying were taken to a police office, where a narcotics detection dog gave indication of the presence of narcotics in the luggage. The defendants were detained until a search warrant was obtained and a search of the bags revealed a large quantity of cocaine. The Court of Appeals held that the luggage detention was lawful even if the personal detention of the defendants violated the Fourth Amendment. It stated:

---

[1] For a discussion of the abilities and value of such dogs in narcotics detection, see *People* v. *Mayberry*, 644 P. 2d 810, 31 Cr L 2190 (Cal. 1982), and Annotation, Use of Trained Dog to Detect Narcotics Or Drugs As Unreasonable Search in Violation of Fourth Amendment, 31 ALR Fed. 931.

> In our view, * * * *Terry* and *Dunaway* and their progeny relate to detention of persons and not inanimate objects. The rationale relied upon by the Court in those cases is inappropriate as applied to "things," a seizure of which constitutes a substantially less serious intrusion upon rights of the individual.
>
> * * * * *
>
> We look then to the standard of reasonableness as required by the fourth amendment in the seizure and detention of inanimate objects. 654 F. 2d at 1359.

Amici do not deny that the length of time of such a detention has an important bearing on the issue of reasonableness of the investigatory technique chosen by the law enforcement officers. The length of time involved in the instant case compares favorably to *Klein, Viegas,* and *West.* The approximate 90 minute delay in the instant case until the narcotics sniffing dog at Kennedy Airport carried out its assignment was substantially similar to the delays involved in those cases. *Klein* does not indicate the length of the delay; *West* indicates that the bag was held for approximately an hour before the dog arrived; in *Viegas* the agents were informed that no dog would be available for four hours when they decided to detain the bag. It is submitted that there is no sound basis for distinguishing the instant case from the cases upholding a temporary detention of luggage based on reasonable suspicion.

Moreover, there is ample justification for the delay in the instant case. In the absence of a narcotics sniffing dog at LaGuardia Airport the only reasonable course of action for the DEA agents was to take the respondent's luggage to Kennedy Airport for exposure to the dog, not to bring the dog to LaGuardia Airport to await the arrival of the respondent's luggage on the flight from Florida, since to do so would have left Kennedy Airport without the services of the dog. This Court is no doubt aware that international flights hold the greatest potential for the influx of narcotics and that such flights

predominate at Kennedy Airport as compared to LaGuardia Airport. In short, the DEA agents took the only feasible steps they could to apply a reasonable investigatory process to the respondent's bags once they had founded suspicion to believe he was carrying narcotics and they did so within the shortest period of time possible under the circumstances.

Amici join with the Government in this case in its concern that law enforcement agents know whether they are permitted to detain a suspect's luggage in order to conduct such an inquiry, or whether they must allow the suspect to leave with his luggage, with the probable result that any contraband contained therein will be delivered successfully or destroyed. In the words of Judge Kaufman in the dissenting opinion, the decision below places an "unwarranted hurdle * * * in the path of agents engaged in the difficult task of controlling the heavy traffic in drugs." 660 F. 2d at 56.

At the same time, however, we also note that the decision below is additionally troublesome in this already complex field of Fourth Amendment law, by erroneously taking the position that the Fourth Amendment draws no distinction between the seizure of a person and the similar seizure of his property. This position is simply not supported by decisions of this Court or any other. This Court has made it clear that the constitutional duration limit of a detention based on reasonable suspicion will vary depending upon the interest invaded by the detention. See, *e.g., Van Leeuwen, supra,* and *Dunaway* v. *New York,* 442 U. S. 200 (1979).

As this Court recognized in *Michigan* v. *Summers,*

> . . . some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity. In these cases, as in *Dunaway,* the Court was applying the

> ultimate standard of reasonableness embodied in the Fourth Amendment. They are consistent with the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause. *But they demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons* . . .

101 S. Ct. 2587, 2591, 29 Cr L 3097, 3099 (1981) (emphasis added).

We submit that the temporary detention of respondent's luggage was a significantly lesser interference with his individual liberty than a detention of his person would have been, and that a reasonable suspicion should be able to support a detention of *property* for a period of time that actually exceeds the maximum period for which a *person* could be detained under the same circumstances. In this case, the limited inconvenience to respondent of having his luggage detained for approximately 90 minutes was justified by the facts that gave rise to the agents' suspicion that the luggage contained narcotics. We ask the Court to find that the detention was reasonable as a matter of law and fact.

We submit as well, that as to the application of the exclusionary rule in this type of case and, in fact, all others involving the Fourth Amendment, exceptions should also be made for **good faith** mistakes by law enforcement officers, as *amici* have argued in two cases presently pending before this Court, *State of Illinois* v. *Gates*, 88 Ill. App. 3d 1095, 423 N. E. 2d 887 (Ill. 1981), No. 81-430, and *State of Florida* v. *Royer*, 389 So. 2d 1007 (Fla. App. 1979), No. 80-2146.

CONCLUSION

Amici respectfully submit that the decision of the United States Court of Appeals for the Second Circuit should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

Of Counsel:
WILLIAM C. SUMMERS, ESQ.
Supervising Attorney,
International Association of
Chiefs of Police, Inc.
Gaithersburg, Md. 20878
EVELLE J. YOUNGER, ESQ.
Chairman of the Board,
Americans for Effective Law
Enforcement, Inc.
Los Angeles, California 90017
HOWARD G. BERRINGER, ESQ.
Assistant Director,
Americans for Effective Law
Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco,
California 94080

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus,
Northwestern University
School of Law
Chicago, Illinois 60611
WAYNE W. SCHMIDT, ESQ.
Executive Director,
Americans for Effective Law
Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco,
California 94080
JAMES P. MANAK, ESQ.
General Counsel,
Americans for Effective Law
Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

Counsel for Amici Curiae